Decision 02-02-049 February 21, 2002

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Application of the California Association of Competitive Telecommunications Companies for Rehearing of Resolution M-4801	A.01-05-032 (Filed on May 15, 2001)
Application of Southern California Edison Company (U 338-E) for Rehearing of Resolution M-4801	A.01-05-043 (Filed on May 21, 2001)
Application of San Diego Gas & Electric Company and Southern California Gas Company for Rehearing of Resolution M-4801	A.01-05-044 (Filed on May 21, 2001)

ORDER MODIFYING RESOLUTION M-4801 AND DENYING REHEARING OF THE DECISION AS MODIFIED

In Resolution M-4801, mailed April 25, 2001, the Commission delegated to staff authority to suspend advice letters in certain limited circumstances.

The California Association of Competitive Telecommunications Companies (CALTEL), San Diego Gas & Electric Company and Southern California Gas Company (SDG&E/SoCalGas), and Southern California Edison Company (Edison) filed timely applications for rehearing.

Applicants assert that in Resolution M-4801 the Commission: 1) exceeds its jurisdiction by delegating discretionary authority to staff in absence of explicit statutory authorization; 2) violates due process requirements of the United States and California Constitutions by allowing suspension of advice letters without a hearing; 3) violates

Public Utilities Code Section 455, which permits suspension of advice letters only pending a hearing concerning the propriety of the proposed tariff; 4) violates Public Utilities Code Section 455 by authorizing automatic extensions of initial suspensions; 5) exceeds its jurisdiction by ratifying previously unauthorized staff suspensions; 6) improperly asserts that authorizing staff to suspend advice letters is vital to the Commission's exercise of its regulatory authority; and 7) improperly ratifies staff's suspension of a specific advice letter, wherein the 120 day initial suspension period expired prior to the April 19, 2001 ratification date.[1]

We have reviewed each allegation raised in the applications for rehearing. There is good cause to modify Resolution M-4801 to correct several minor errors, and to clarify the scope of our delegation to staff of the authority to process and suspend advice letters. Because our modifications are based on the existing record, and concern matters not susceptible to resolution in an evidentiary hearing, we find no good cause to hold such a hearing here.

DISCUSSION

A. The Commission May Lawfully Delegate Suspension Authority

Applicants contend that Resolution M-4801 unlawfully delegates to staff authority to suspend advice letters since, in the absence of statutory authority, public agencies and officers are prohibited from delegating to subordinates powers that involve the exercise of judgment or discretion. CALTEL and SDG&E/SoCalGas contend that *Johnson v. State of California* (1968) 69 Cal.2d 782, and similar cases cited in Resolution M-4801 to show that the distinction between ministerial and discretionary action is often given undue emphasis, turned on policies regarding public employee immunity, not delegation, and that *California School Employees Association v. Personnel Commission* (*California School Employees*) (1970) 3 Cal.3d 139, *Schecter v. County of Los Angeles* (*Schecter*) (1968) 258 Cal.App.2d 391, and *Bagley v. City of Manhattan Beach* (*Bagley*)

[1] All statutory references are to the Public Utilities Code, except as otherwise indicated.

(1976) 18 Cal.3d 22, more relevantly distinguish between delegable ministerial, and nondelegable discretionary, authority.

Applicants state that in *Arik Sharabi v. Lorrie's Travel and Tours, Inc.* (*Sharabi*) (1983) 11 Cal.P.U.C.2d 1020, we found that staff could reject filings for non-compliance with our orders, but that filings that did comply, but were nonetheless questionable, could only be suspended by a Commission order. And in *Re U.S. West Cellular of California, Inc.* (*U.S. West*) (1992) 43 Cal.P.U.C.2d 367, we noted that we could delegate ministerial authority to apply mathematical formulae to check whether proposed rates conformed to our requirements.

Applicants especially target Guidelines 2(a), 2(b) and 2(e). Guideline 2(a) requires staff to suspend if more information or time is needed to analyze an advice letter adequately; 2(b) permits staff to suspend where more time is needed to review protests; and 2(e) allows suspensions on grounds similar to those specifically set forth in the guidelines.

CALTEL, SDG&E/SoCalGas, and Edison take an excessively simplistic view of our authority to delegate responsibilities to staff.

1. The Ability To Delegate Is Essential To The Functioning Of Government

In adopting rules governing service and fixing rates, the Commission exercises the legislative functions delegated to it. (*Wood v. Public Utilities Commission* (1971) 4 Cal.3d 288, 292.) The United States and California Supreme Courts have long recognized that the Congress, and state legislative bodies, may constitutionally delegate to administrative agencies broad regulatory authority, as long as the legislative body provides the broad policy to be followed and adequate implementation guidelines. Congress may delegate decision-making power as long as it provides an "intelligible principle to which the person or body authorized to [act] is directed to conform." (*Whitman v. American Trucking Associations, Inc.* (*Whitman*) (2001) 531 U.S. 457, 472, quoting *J.W. Hampton, Jr. & Co. v. United States* (1928) 276 U.S. 394, 409.) Similarly, state legislative bodies cannot delegate their power to change laws or make fundamental

policy, but may delegate legislative power if the delegation is channeled by a sufficient standard and accompanied by safeguards adequate to prevent its abuse. (*Kugler v. Yocum* (1968) 69 Cal. 2d 371, 375-377.)

Legislation need not spell out in minute detail the manner in which an agency is to proceed, or eliminate all discretion. *Whitman*, supra, notes that "even in sweeping regulatory schemes we have never demanded ... that statutes provide a 'determinate criterion' for saying 'how much of [the regulated harm] is too much'" (531 U.S. at 475) and that "'[A] certain degree of discretion…inheres in most executive or judicial action'" (id., quoting *Mistretta v. United States* (1989) 488 U.S. 361, 417 (Scalia, J., dissenting); see also 488 U.S. at 378-379 (majority opinion)).

Gaylord v. City of Pasadena, (1917) 175 Cal. 433) cited in *Kugler v. Yocum*, supra, affirmed the delegation to the city electrician of authority to order owners to cease using, and repair, dangerous electric wiring or appliances, even though the delegating ordinance did not define what conditions the electrician must find before determining that wiring or appliances were unsafe. After a classic explanation why delegations of authority are essential to the functioning of governments, *Gaylord* further noted that:

> "Laws are not made upon the theory of the total depravity of those who are elected to administer them; and the presumption is that municipal officers will not use these small powers villainously and for the purposes of oppression or mischief." (*In re Flaherty*, 105 Cal. 562 …) … That an official charged with such duty as this may, and indeed must, exercise discretion precisely as he may or must exercise judgment, is, of course, true, but this fact in no way militates against the validity of the law … (175 Cal. at 437.)

At the heart of the Court's analysis was the recognition that legislative bodies must be able to delegate broadly, because without such delegation, the wheels of government would grind to a halt. (175 Cal. at 436-437, citing *Union Bridge Co. v. United States* (1907) 204 U.S. 364.) The same is true of administrative agencies.

2. The Commission May Delegate To Staff Tasks That Involve The Exercise Of Judgment And Discretion, As Long As It Retains Responsibility For Fundamental Policy Decisions And Provides Staff With Adequate Guidance

CALTEL, SDG&E/SoCalGas, and Edison overstate their construction of *California School Employees*, supra, *Schecter*, supra, and similar decisions. These applicants also ignore the policy concerns involved in characterizing authority as "discretionary" or "ministerial" in differing contexts. The ability of an agency to delegate does not depend on whether staff must actually exercise judgment and discretion.

After reciting the general rule that discretionary powers may not be delegated to subordinates in the absence of statutory authorization, *California School Employees*, supra, states:

> On the other hand, public agencies may delegate the performance of ministerial tasks, including the investigation and determination of facts preliminary to agency action … Moreover, an agency's subsequent approval or ratification of an act delegated to a subordinate validates the act, which becomes the act of the agency itself. (*California School Employees*, supra 3 Cal.3d at 144-145.)

Similarly, *Schecter*, supra, states:

> When an act or duty is discretionary the information needed for the exercise thereof, … , need not be personally gathered. "… the rule that requires an executive officer to exercise his own judgment and discretion in making an order of such nature does not preclude him from utilizing, as a matter of practical administrative procedure, the aid of subordinates directed by him to investigate and report the facts and their recommendation in relation to the advisability of the order, and also to draft it in the first instance. [Citations.] It suffices that the judgment and discretion finally exercised and the orders finally made by the superintendent were actually his own …" (*School Dist. No. 3 of the Town of Adams v. Callahan*, 237 Wis. 560 ...) (258 Cal.App.2d 391 at 397-398.)

And, as noted in Resolution M-4801, *Holley v. County of Orange* (1895) 106 Cal. 420, 424-425, acknowledges that:

> Judgment must often be exercised by ministerial officers in determining whether or not the facts exist which authorize them to act.

Thus, while *California Schools*, supra, *Schecter*, supra, and other cases follow the general rule that agencies cannot delegate discretionary duties in the absence of statutory authority, they really stand for the narrower principle that while agencies cannot delegate the power to make fundamental policy decisions or "final" discretionary decisions, they may act in a practical manner and delegate authority to investigate, determine facts, make recommendations, and draft proposed decisions to be adopted or ratified by the agency's highest decision makers, even though such activities in fact require staff to exercise judgment and discretion.

The varying meanings the terms "discretionary" and "ministerial" have in different contexts makes it difficult to determine which category a particular action falls into. Cases outside the area of delegation indicate that courts must not rely on mere semantics, but must examine why, from a policy standpoint, a particular action should be characterized as "discretionary" or "ministerial." The California Tort Claims Act, Government Code Section 810 et seq., as a rule, insulates agencies from liability for the consequences of discretionary, but not ministerial, employee actions. If all employee actions were discretionary, agencies would be immune even when employees were grossly negligent. In *Johnson*, supra, the California Supreme Court found that because almost all actions involve judgment or discretion, policy considerations, rather than the actual use of judgment or discretion, were the critical factor in determining whether an employee had acted in a "discretionary" or a "ministerial" manner.

As noted in Resolution M-4801, the *Johnson* court states:

> We follow equally sound precedent, however, in rejecting the state's invitation to enmesh ourselves deeply in the semantic thicket of attempting to determine, as a purely literal matter, "where the ministerial and imperative duties end and the discretionary powers begin…. [I]t would be difficult to

> conceive of any official act, no matter how directly ministerial, that did not admit of some discretion in the manner of its performance, even if it only involved the driving of a nail." (*Ham v. County of Los Angeles* (1920) 46 Cal.App. 148, 163 ...) (69 Cal.2d at 788.)

The Court went on to quote *Ne Casek v. City of Los Angeles* (1965) 233 Cal.App.2d 131, 135:

> Since obviously no mechanical separation of all activities in which public officials engage as being either discretionary or ministerial is possible, the determination of the category into which a particular activity falls should be guided by the purpose of the discretionary immunity doctrine.

Ultimately, *Johnson* found that a parole officer's failure to warn a couple that a prospective foster child had homicidal tendencies was not immune, since the determination whether to warn was "at the lowest, ministerial rung of official action." (69 Cal.2d at 795-797, citing numerous Federal Tort Claims Act (28 U.S.C. Sections 1291 et seq.) cases distinguishing discretionary from ministerial acts; see also, *Johnson v. County of Los Angeles* (1983) 143 Cal.App.3d 298, 312-313, and *Barner v. Leeds* (2000) 24 Cal.4th 676, 685.)

In cases involving the California Environmental Quality Act (CEQA) (Public Resources Code Section 21080 et seq.), courts often find an agency's action to be "discretionary," rather than "ministerial," on policy grounds, since CEQA must be "interpreted … to afford the fullest protection to the environment," (*Friends of Mammoth v. Board of Supervisors* (1972) 8 Cal.3d 247, 259) and only "discretionary" actions are subject to CEQA review. *Friends of Westwood, Inc. v. City of Los Angles* (*Westwood*) (1987) 191 Cal.App.3d 259, 271 explains:

> CEQA applies even where the process is largely ministerial. As one court held: "Statutory *policy*, not semantics, *forms the standard for segregating discretionary from ministerial function* …. So construed, section 21080 extends CEQA's scope to hybrid projects of a mixed ministerial-discretionary character; doubt *whether a project is ministerial or discretionary should be resolved in favor of the latter characterization*." (*People v. Department of Housing and*

> *Community Dev.* (*Ramey*) (1975) 45 Cal.App.3d 185, 194 (Emphasis added by *Westwood.*).)

Westwood notes that CEQA's legislative history, guidelines, and case law require a different boundary between "discretionary" and "ministerial" than is proper for governmental immunity. (191 Cal.App.3d at 266.) In immunity cases, public policy may favor finding an employee's action ministerial. In CEQA cases, environmental protection favors finding that projects are discretionary.

Although the delegation of authority at issue here involves neither immunity nor CEQA analysis, the basic principle in both these contexts - that characterization of tasks as ministerial or discretionary should be based on policy concerns, not semantics - remains relevant. The need to allow staff to assist agency decision makers favors characterizing staff actions to investigate, determine facts, make recommendations, and draft proposed decisions to be adopted or ratified by the agency's highest decision makers, as "ministerial" and "delegable," even though such activities involve staff judgment and discretion.

In any event, the Legislature has in a number of broad statutory provisions expressly recognized our need to delegate responsibility to perform the duties and exercise the powers conferred upon the Commission. Section 7 states:

> Whenever a power is granted to, or a duty imposed upon, a public officer, the power may be exercised or the duty may be performed by a deputy of the officer or by a person authorized, pursuant to law, by the officer, unless this code expressly provides otherwise.

Section 308(a) states in part:

> The executive director shall be responsible for the commission's executive and administrative duties and shall organize, coordinate, supervise, and direct the operations and affairs of the commission and expedite all matters within the commission's jurisdiction.

Section 308(b) states in part:

> The executive director shall … issue all necessary process, writs, warrants, and notices, and perform such other duties as the president, or vote of the commission, prescribes. …

And Section 309 states:

> The executive director may employ such officers, administrative law judges, experts, engineers, statisticians, accountants, inspectors, clerks, and employees as the executive director deems necessary to carry out the provisions of this part or to perform the duties and exercise the powers conferred upon the commission by law. …

These provisions clearly authorize delegation of responsibilities that involve the exercise of actual judgment and discretion, and not simply the application of a rubber stamp or mathematical formula.[2] The Executive Director is responsible for the Commission's "executive and administrative duties" (Section 308(a)), and for issuing all necessary process, notices, and performing "such other duties as the president, or vote of the commission, prescribes" (Section 308(b)). In addition, the Executive Director is expressly empowered by Section 309 to employ staff "to perform the duties and exercise the powers conferred upon the commission by law," including, implicitly, the duties and powers associated with the review and processing of advice letters. Staff has ably performed these duties and powers for many years, processing several thousand advice letters annually under the guidance of GO 96-A and other orders of the Commission. Thus, our present delegation to staff of responsibilities for reviewing and processing advice letters falls squarely within our statutory authority.

3. GO 96-A Currently Authorizes Staff To Exercise Discretion

Resolution M-4801 does not reflect revolutionary changes to staff's authority, since GO 96-A currently authorizes staff to exercise judgment and discretion. For example, Section II.J provides:

> Substitute tariff sheets are allowed in order to make minor changes due to typographical errors or other errors that are insignificant in impact. At the discretion of the staff, such

[2] See also, Section 455.1(c): "If, upon its own initiative, the commission, acting through the staff organization with responsibility for reviewing advice letter filings, determines that the schedule filed by a water corporation for service of recycled water is not justified, it shall notify the water corporation of the determination in writing within 40 days … and shall state in the notice all changes … that are required to make it just and reasonable. …"

> substitute tariff sheets may be filed without being served on the parties receiving the original advice letter.

Section III.I states:

> An advice letter supplement may be filed for relatively minor changes to the original advice letter, such as: modifications to respond to a protest; deletion of a new service questioned by a protester or staff; a clarifying change in language; or request of a later effective date … The Commission staff has the responsibility to either accept the advice letter supplement or, where significant changes are proposed, to require the utility to file an entirely new advice letter.

These provisions give staff the discretion to determine whether substitute tariff sheets must be served on the parties receiving the original advice letter; question new services; and review the advice letter for clarity. Staff also determines whether advice letter supplements appropriately modify proposed tariffs in response to a protest, or instead propose significant changes and thus must be rejected.

GO 96-A Section VI provides that utilities:

> may request authority for a general rate increase by an advice letter filing if the projected annual operating revenues … are no greater than $750,000. … The advice letter must include an adequate showing and justification. Procedures for processing such filing will be established by the Executive Director who may, where necessary, require the utility to file a formal application. …

If an advice letter fails to adequately explain the impacts of a proposed rate increase, or its relationship to other tariffs, Commission orders, or policies, it does not include an adequate showing and justification under GO 96-A Section VI. Such advice letters may be rejected for non-compliance with the General Order, and the utility required to file a formal application under our Rules of Practice and Procedure (Rules) (Title 20, California Code of Regulations, Chapter 1). (See, e.g., *Pacific Bell v. Public Utilities Commission* (2000) 79 Cal.App.4th 269, 274, 283.) The establishment of procedures, and decisions to require a utility to file a formal application, involve the exercise of judgment by our Executive Director, who properly relies on staff.

GO 96-A Section VII provides:

> The Commission or its staff may reject tariff sheets which do not conform to the requirements specified in this Order, or which have alterations on the face thereof or contain errors. … The Commission or its staff will return one copy of such rejected sheets to the public utility, with a letter stating the reasons for the rejection. …

Again, staff is expressly delegated authority to decide whether tariff sheets conform to GO 96-A, have alterations, or contain errors, and to reject non-conforming or erroneous tariff sheets. Thus, staff may determine whether an advice letter adequately conforms to the Section III. C requirement that advice letters must: "[c]all attention to each increase or decrease in rate or charge, or change in condition which may result in an increase or decrease in, more or less restrictive conditions, or withdrawal of service…, " and provide other required information regarding proposed tariffs. These decisions involve judgment.

Staff's role in reviewing advice letters is analogous to the role of an Assigned Commissioner or Administrative Law Judge in conducting a formal proceeding. Under the Public Utilities Code and the Commission's Rules, an Assigned Commissioner or Administrative Law Judge has the power to make rulings, preside over hearings, and take procedural actions that would affect the timing of the Commission's ultimate disposition. (Public Utilities Code Sections 311(a)-(d); see also, e.g., Rules 5-6.3, 8-8.2, 13, 13.2, 14.4, 45, 48-49, 52-54, 57-58, 59.2-63, 65, 68-69, 71, 74-76, 76.74, 77-77.7.)

4. Commission Precedent Does Not Preclude Our Delegation Of Authority In Resolution M-4801

Sharabi and *U.S. West,* supra, reflect a simplistic approach to delegation issues, do not acknowledge that staff has always exercised a degree of judgment and discretion when implementing GO 96-A, and do not consider California Supreme Court decisions noting the weakness of semantic distinctions between ministerial and discretionary acts. Further, these decisions predate the amendment of Section 311(g) to

require the circulation of most Commission decisions 30 days before they are acted on. (Stats. 1998, c.886 (S.B. 779).)

Our past decisions do not restrict our ability to refine our analysis and make adjustments to reflect new statutory requirements and practical concerns relating to our need to comply with both Section 311(g) and Section 455. In any event, our guidelines, as revised, provide further limits on staff's authority and make clear that we ourselves determine all fundamental policies and will make all necessary discretionary orders regarding the merits of advice letters.

B. The Commission's Ability To Perform Its Regulatory Obligations Requires That Staff Be Delegated Authority To Suspend Advice Letters

Edison argues that we err in stating in Resolution M-4801, Finding of Fact 1, that: "Staff suspension of advice letters is necessary for the Commission's performance of its responsibilities." We disagree.

The Commission is a constitutional agency with regulatory authority over public utilities and similar entities. We review thousands of advice letters annually.[3] In processing advice letters we must comply with two statutes, Sections 311(g) and 455; the first requires us to circulate most proposed decisions for public comment before we put them to a vote, and the second provides that if we do not take action to suspend tariff filings within 30 days they become effective by operation of law. We simply cannot comply with these overlapping statutory mandates, for the massive volume of advice letters we receive, without delegating certain suspension responsibilities to our staff.

Edison asserts that we can normally act within the Section 455 time limit, since Section 455 lets us act "at once" and issue an order convening hearings and suspending proposed tariffs. Edison claims we may reduce the normal review period pursuant to Section 311(g)(2), and modify on a prospective basis any tariff that became effective by default.

[3] In 1999, 3,824 advice letters were filed. In 2000, 3,965 advice letters were filed. (Opinion Revising Proposed General Order 96-B and Adopting that General Order as Revised (draft decision of ALJ Kotz, mailed April 19, 2001) in Rulemaking 98-07-038, at page 5, footnote 3.)

Regardless of the length of the comment period, the issuance of a suspension order generally requires that a proposed decision be drafted, noticed in the Commission's Daily Calendar, and circulated to the appropriate service list and the public; that comments and reply comments be reviewed, and responded to; and that Commissioners devote attention to draft proposed suspension orders, comments, and replies, no matter how routine the issue involved. The use of this procedure for routine advice letter suspensions would not be an efficient use of our time, or of the time of our staff, whom we rely on greatly for the effective performance of our regulatory responsibilities.[4]

Compliance with both Section 455 and Section 311(g)(2) is further complicated when a utility requests a Commission order affirming an advice letter. *Edison v. Public Utilities Commission* (*Edison*) (2000) 85 Cal. App.4th 1086, found that an Edison advice letter establishing a fuel oil memorandum account became effective by operation of law because we failed to suspend it within the time limits in Section 455 and GO 96-A. The court recognized the conflict between Sections 311 and 455 in such circumstances:

> Moreover, the automatic procedure for approval contemplated in section 455 and GO 96-A appears fundamentally incompatible with the resolution procedure requested by SCE [Edison]. For example, section 311, subdivision (g) imposes procedural requirements when the Commission votes out a resolution. Under section 311, subdivision (g), the PUC must release a proposed resolution to the public 30 days before adoption. Additionally, the PUC also must consider possible protests, may issue an alternate draft resolution for comment, and must vote on a resolution. At oral argument, both parties conceded that this process could not have been completed in

[4] Further, no matter how greatly the comment period is reduced, the Commission must still comply with the Government Code Section 11125 requirement that it provide notice of the items to be addressed at its meetings at least 10 days in advance of the meetings in most circumstances. Government Code Section 11125.3 provides exceptions when the majority of the state body determines that an emergency situation exists, as defined in Government Code Section 11125.5, or upon a determination by a two-thirds vote of the state body, or if less than two-thirds of the state body are present, a unanimous vote of the members present, that there is a need for immediate action and that the need came to the attention of the state body after the agenda for the meeting was posted. Section 11125.3 requires that notice of the additional item to be considered shall be provided to each member of the state body and to all parties that have requested notice of the state body's meetings in a manner that allows the members and the media to receive the notice 48 hours before the meeting. These shortened notice options are not appropriate or practical for use on a routine basis.

> time for the Commission to issue a resolution within 40 days. (85 Cal.App.4th at 1108.)

We could let tariffs go into effect by operation of law, and then hold hearings to consider modifying them prospectively, but this is not our general preference. As we noted in Resolution M-4801:

> Rather than permitting advice letters to become effective by default, and then holding hearings to consider whether it is necessary to "alter or modify them," we find it more sensible to and appropriate to affirm staff's authority to suspend advice letters so that they may be reviewed before the proposed tariffs become effective. Our approach sidesteps continuity problems that may result if tariffs go into effect by default, and then are altered or modified by the Commission after a hearing. (Resolution M-4801 at 8.)

Our ability to review advice letters adequately, before they become effective, is critical. Although only a small percentage require review beyond the default effective date, this is still a large number. Our guidelines let staff direct us to matters needing detailed review, rather than to routine suspension orders, and are necessary for us to perform our regulatory responsibilities efficiently.

C. Resolution M-4801 Guidelines, As Amended, Provide A Meaningful Opportunity To Be Heard Regarding All Advice Letters

SDG&E/SoCalGas argue that Section 455 permits a tariff filed in an advice letter to be suspended only when the Commission orders a hearing. They complain that Resolution M-4801 allows staff to suspend a tariff prior to the determination of the need for a hearing for many reasons, including staff's need for more review time. They assert that this approach violates the Fourteenth Amendment of the United States Constitution, and Article 1, Section 7(a) of the California Constitution, by depriving them of property rights without due process of law, and that the Resolution also violates the California Constitution because it does not provide adequate notice or an opportunity to be heard.

SDG&E/SoCalGas note that the California Supreme Court held that what constitutes a hearing depends on the context, and has stated:

> "[An administrative hearing] consists of any confrontation, *oral or otherwise*, between an affected individual and an agency decision-maker sufficient to allow [an] individual to present his [or her] case in a meaningful manner." (*Lewis v. Superior Court* (1999) 19 Cal. 4th 1232, 1247, quoting Black's Law Dict. (6th ed. 1990) (Emphasis added by Court.).)

SDG&E/SoCalGas claim that the opportunity to respond to staff requests for more information is not an administrative hearing and does not allow a utility to present its case in a meaningful manner to agency decisionmakers, or provide adequate notice that a hearing is in progress. The utilities also assert that *Edison*, supra, questioned whether our advice letter procedures involved a hearing within the meaning of Section 455. (85 Cal. App. 4th at 1112.)

Upon further reflection, we will provide further guidance as to when staff should request, and utilities must provide clarifying information, when staff should reject advice letters or otherwise dispose of them on a ministerial basis, and when staff must suspend advice letters to allow further review.

Specifically, we will provide that staff must request, and utilities must provide, prior to the initial default effective date, any information needed to cure informational deficiencies and thus enable the advice letter to meet filing requirements, and any additional information needed to address issues raised in a protest or during staff analysis. If a utility cannot provide the information by the initial default effective date, the utility may, pursuant to GO 96-A Section III.I, file an advice letter supplement requesting a later effective date.

We will require staff to review each advice letter, and any protests and responses, to determine whether the advice letter must be rejected. If an advice letter does not meet procedural or substantive requirements set forth in a statute and/or Commission order prior to the default effective date, or the later effective date if the utility files an advice letter supplement requesting a later effective date, it must be rejected. And if an advice letter requests relief that can only be granted after an evidentiary hearing or that otherwise requires a formal proceeding (e.g., because the

advice letter and/or protest raise a disputed issue of material fact), it must be rejected without prejudice.

Staff must also determine whether a hearing regarding an advice letter is required, and, if so, what type of hearing should be held. Due process does not require a full evidentiary hearing in all instances. (E.g., *Lewis v. Superior Court*, supra; see also, *Wood v. Public Utilities Commission*, supra, and *Los Angeles County Civil Service Commission v. Superior Court* (1978) 23 Cal.3d 55, 62.) In many situations, we may dispense with many features of formal evidentiary hearings, such as evidentiary rules and objections, formal transcripts, and cross-examination, while still providing an ample opportunity to be heard. In the case of an advice letter, the opportunity to be heard will, at a minimum, consist of the opportunity for anyone to protest the advice letter, and for the utility to respond to any protests.

If an advice letter and/or protest raise a disputed issue of material fact, an evidentiary hearing in a formal proceeding is required, and the advice letter must be rejected without prejudice, as noted above. The utility may choose to seek further relief through an application or other formal proceeding. Such proceedings will be conducted in accord with our Rules of Practice and Procedure.

If an advice letter and/or protest do not raise a disputed issue of material fact, an evidentiary hearing in a formal proceeding is not required, and the advice letter and/or protest may be resolved through a notice and comment process, workshop, or other informal hearing. This informal, non-evidentiary, procedure constitutes a Section 455 hearing. An advice letter subject to a Section 455 hearing must be suspended pending the disposition of the advice letter, unless it has been disposed of by the default effective date.

If an advice letter in its original form complies with the Commission order authorizing or requiring the filing of the advice letter, is not protested, raises no policy concerns or other substantive issues, does not require a formal proceeding, and does not request that the Commission issue an order approving the advice letter, staff may dispose of the advice letter by permitting it to become effective on its own terms. Staff must keep

a log of advice letters that become effective by uncontested acceptance, but need not take further formal action. As is the case with any tariff that becomes effective without having been suspended, the Commission reserves the right under Section 455 to hold hearings regarding tariffs that become effective by uncontested acceptance, and to thereafter alter or modify such tariffs where appropriate.

If an advice letter is protested or modified, but, either in its original form or as modified, complies with the Commission order authorizing or requiring the filing of the advice letter, raises no policy concerns or other substantive issues, does not require a formal proceeding, and does not request that the Commission issue an order approving the advice letter, staff will provide written notice stating the date upon which the advice letter will become effective. For example, staff, consistent with its role and responsibilities, can verify whether a particular calculation in an advice letter is correct. Similarly, staff may reject a protest that raises issues that go beyond the scope of the advice letter.

Staff may provide written disposition notices in circumstances in which no formal disposition action is necessary, although there is no obligation to do so.

If an advice letter may not be disposed by allowing it to go into effect on its own terms or by a staff disposition notice, staff must propose, and circulate for public review and comment, a draft resolution or other order for final action by the Commission. Draft resolutions will be noticed in the Commission's Daily Calendar, and an opportunity to file comments and reply comments will be provided. Where appropriate, staff may schedule workshops or other proceedings prior to preparing and circulating a draft resolution for the Commission's consideration.

Under the guidelines we are adopting today, the inclusion in an advice letter of a request that the Commission issue an order approving the advice letter will result in the automatic suspension of the advice letter pending a Commission order disposing of the particular advice letter. Therefore, utilities that wish to take advantage of the effective period within Section 455 should not include in an advice letter a request that we issue an order approving the advice letter.

Our guidelines also provide that if a Commission order states that an advice letter will become effective upon staff's approval, staff must suspend that advice letter by the initial date the advice letter might become effective by operation of law, pending a Section 455 hearing, unless: 1) staff has by that date notified the utility in writing that it has reviewed the advice letter and verified its compliance with the Commission order; or 2) the utility files an advice letter supplement requesting a later effective date in lieu of suspension of the advice letter, with the specified date being the date staff approves the advice letter.

D. The Automatic Second Suspension Period Does Not Violate Section 455.

Applicants assert that because Section 455 states that suspended tariffs become effective in 120 days unless the Commission extends the suspension, we must issue a separate order for each extension. This is incorrect.

Section 455 states in part that: "the period of suspension … shall not extend beyond 120 days beyond the time it would otherwise go into effect unless the commission extends the period of suspension for a further period not exceeding six months." Section 455 does not state that a suspension may be extended only by a separate Commission order, or that such an extension order must be issued, if at all, toward the end of the initial suspension period. Nor does Section 455 state that we can extend suspensions only if specific criteria are met.

Since Section 455 expressly gives us discretion to extend initial suspension periods for up to six months, and sets no extension criteria beyond the six month limit, we do not err in exercising our discretion now to order that all initial suspensions be extended in one limited, clearly specified, circumstance: where we have not yet issued a resolution or other order, or otherwise disposed of the advice letter. It makes no sense to issue individual suspension extension orders, when the reason for all extensions is the same: we do not want suspended advice letters to go into effect while we review them. Our uniform, common sense, exercise of our Section 455 discretion to extend suspensions automatically is lawful.

E. The Commission Lawfully Ratified Staff Suspensions

Edison claims that no Commission decision prior to Resolution M-4801 allows staff to suspend advice letters to obtain more review time, and that staff's pre-Resolution M-4801 suspensions of several advice letters on that basis were unauthorized. Edison also argues that we cannot retroactively delegate authority to decide if more review time is needed, or through ratification make valid acts that were not valid in the first place.

Edison is incorrect. The fact that we did not expressly delegate such authority to staff prior to Resolution M-4801 is irrelevant. As long as we ourselves have the authority to suspend advice letters to permit additional review, we may ratify prior staff suspensions on that basis. With our ratification, the staff suspensions become our own, effective nunc pro tunc as of the date the suspensions were initiated by staff. (*California School Employees*, supra, 3 Cal.3d at 145.) Edison has failed to demonstrate that our ratification of staff suspensions is unlawful.

F. Suspension Of Edison Advice Letter 1462-E.

Edison states that the Resolution M-4801 ratification of the staff suspension of Edison's Advice Letter 1462-E (establishing a new form regarding an assignment for electric line extensions or facilities) is moot. Edison filed Advice Letter 1462-E on July 7, 2000. On August 16, 2000, Edison received a letter from the Director of our Energy Division, stating that the advice letter was suspended for up to 120 days to allow further review. More than 120 days passed with no Commission action regarding Edison's filing. Edison asserts that even if we could ratify the suspension, the tariff already became effective 120 days after August 16, 2000, pursuant to Section 455, because the suspension was not extended.

We agree that Advice Letter 1462-E became effective 120 days after the August 16, 2000 staff suspension. Since the initial staff suspension letter provided a suspension of "up to 120 days," and staff did not extend the suspension, the suspension expired by its own terms after 120 days. The automatic extensions in the Resolution

M-4801 guidelines do not apply to suspensions ending before the Resolution was adopted on April 19, 2001.

REVISED GUIDELINES

Our revised guidelines, set forth in Appendix A, permit us to process advice letters effectively and expeditiously by relying on staff to review the thousands of advice letters we receive annually and take ministerial action pursuant to pre-determined criteria, while reserving to ourselves authority to set fundamental policy and make final discretionary decisions regarding the merits of advice letters that may not be disposed of by staff. As we note in Resolution M-4801, these guidelines may be superseded by Commission decisions in the GO-96 Rulemaking (Rulemaking (R.) 98-07-038), or any other appropriate proceeding. In that proceeding, the Commission may take a different approach to these issues, and may upon further consideration find some aspects of this decision to be unnecessary.

CONCLUSION

For the reasons stated above. We deny the applications for rehearing of Resolution M-4801, as modified herein.

THEREFORE, IT IS ORDERED that:

1. The applications filed by CALTEL, SDG&E/SoCalGas, and Edison for rehearing of Resolution M-4801 as modified herein are denied.
2. Resolution M-4801 is modified as follows:
   a. On pages 15-18, the
   b. Guidelines are deleted, and replaced with the guidelines set forth in Appendix A of this order.
   c. On page 28, Ordering Paragraph 1 is revised by the insertion of a period after the word “resolution,” and the deletion of the remainder of the Ordering Paragraph.
   d. On page 29, Ordering Paragraph 4 is revised to delete the reference to Advice Letter 1462-E.

This order is effective today.

Dated February 21, 2002, at San Francisco, California.

LORETTA M. LYNCH
President
RICHARD A. BILAS
CARL W. WOOD
GEOFFREY F. BROWN
Commissioners

I abstained.

/s/ Henry M. Duque
Commissioner

APPENDIX A

GUIDELINES FOR ADVICE LETTER REJECTION, SUSPENSION, AND HEARINGS

I. GENERAL

A. Applicability

These guidelines apply to advice letters filed by gas, electric, telephone, water sewer system, pipeline, and heat utilities, except to the extent they may be inconsistent with Public Utilities Code Section 455.1, Section 455.3, any other relevant statute, and/or any other relevant Commission order. Staff shall have the authority to suspend rate changes of oil pipeline corporations to the extent the Commission has such authority under Section 455.3.

B. Staff Authorization

The Executive Director, or his or her designated representatives, may reject or suspend advice letters as provided in these guidelines and in other relevant orders of the Commission.

The Directors of the Energy, Telecommunications, and Water Divisions, or their designated representatives, may reject or suspend advice letters filed with their respective divisions, as provided in these guidelines.

C. Assigned Commissioner Authorization

The Commissioner assigned by the Commission to oversee a specified class of utility may initiate an inquiry or hearing regarding advice letters filed by a utility within that class, pursuant to Public Utilities Code Section 310, and may suspend such advice letters pending the inquiry or hearing.

D. Definitions And References

“Order” means any order of the Commission, including any general order, resolution, or other decision of the Commission, or any ruling by an Assigned Commissioner or Administrative Law Judge.

“Tariff” refers to any individual or joint rate, classification, contract, practice, or rule. All statutory citations are to the Public Utilities Code.

II. INFORMATION TO BE INCLUDED IN ADVICE LETTERS

A. Required Information

Advice letters must include all information required by relevant statutes and Commission orders, including provisions requiring an adequate showing and justification of the proposed tariffs.

B. Information Deficiencies

Staff may request information regarding an advice letter to cure informational deficiencies and thus enable the advice letter to meet the requirements of Paragraph II.A. Informational deficiencies include: 1) vague language; 2) failure to explain the impact of the advice letter on rates and services; 3) failure to explain how proposed tariffs implement or comply with statutory requirements and/or Commission orders; 4) failure to explain relationships between proposed tariffs and current tariffs (whether of the advice letter filer or, if applicable, of other utilities); and 5) failure in any other respect to include information required by statute and/or Commission orders.

Staff should request information in detail, as early as possible, so that the utility may provide the required information before the initial default effective date.

C. Additional Information

Staff may request additional information to address issues raised in a protest or during staff analysis.

D. Deadline For Providing Requested Information

A utility from which staff requests information pursuant to Paragraph II.B or II.C must provide the requested information within 5 days of staff's request, or at least 1 day before the initial default effective date, whichever date is earlier.

A utility may file an advice letter supplement requesting a later effective date in lieu of rejection or suspension of an advice letter, if the utility cannot provide the requested information by the specified response date. Utilities should consult staff regarding the appropriate effective date to include in the advice letter supplement.

III. EFFECTIVE DATES

A. Default Effective Dates

1. Initial Default Effective Date: If Advice Letter Is Not Rejected Or Suspended

An advice letter subject to Section 455, Section 455.1, or the provisions of Section 455.3 dealing with a rate change becomes effective by operation of law if it is not rejected or suspended by the initial default effective date specified in the relevant statute. Advice letters subject to a Commission order setting a different default effective date become effective if not suspended by the relevant default effective date.

2. Final Default Effective Date: If Suspension Ends Without Commission Action

If an advice letter subject to Section 455, Section 455.1, or the provisions of Section 455.3 dealing with a rate change has been suspended, and the suspension period (including any extension) ends before the Commission rejects or otherwise acts on the advice letter, the advice letter becomes effective by operation of law on the day after the suspension period ends.

B. Advice Letters Not Subject To Section 455

Requests for approval of rate increases, or other tariffs that may result in rate increases, are not subject to Section 455, and thus may under Section 454 not go into effect on a default basis in the absence of a Commission order. Section 455 only governs filings that do not increase or result in an increase in any rate. Examples of tariff filings that increase rates or may result in rate increases include tariff changes that: increase any rate or charge; change any condition or classification so as to result in an increase; or make changes that will result in a lesser service or more restrictive conditions at the same rate or charge.

C. Advice Letters Requesting Later Effective Date

If an advice letter requests a specific effective date that is later than the date the advice letter might otherwise become effective by operation of law, the advice letter may by its own terms not become effective until the requested effective date at the earliest. If the utility subsequently files an advice letter supplement requesting a later effective date, the advice letter may not become effective until the later effective date, at the earliest. As appropriate, staff may suspend such

advice letters under the other provisions of these guidelines to prevent them from becoming effective on the later requested effective date.

IV. ` MANDATORY REJECTION OF ADVICE LETTERS

A. If An Advice Letter Does Not Meet Requirements

An advice letter must be rejected if it does not meet procedural or substantive requirements set forth in a statute and/or Commission order prior to the default effective date, or the later effective date if the utility files an advice letter supplement requesting a later effective date.

B. If An Advice Letter Requires An Evidentiary Hearing Or Otherwise Requires A Formal Proceeding

An advice letter must be rejected without prejudice if it requests relief that can only be granted after an evidentiary hearing, if a protest raises a disputed issue of material fact, or the advice letter otherwise requires a formal proceeding.

V. HEARING AND DISPOSITION PROCEDURES

A. Determination Whether A Hearing Is Required

Staff must review each advice letter, and any protests and responses, to determine whether a hearing regarding the advice letter is required.

1. Evidentiary Hearing

If an advice letter and/or protest raise a disputed issue of material fact, an evidentiary hearing in a formal proceeding is necessary, and the advice letter must be rejected without prejudice. If a utility subsequently files an application or other request for relief in a formal proceeding, the formal proceeding, including any evidentiary hearing, will be conducted in accord with the Commission's Rules of Practice and Procedure**.**

2. Section 455 Hearing

If an advice letter and/or protest do not raise a disputed issue of material fact, an evidentiary hearing in a formal proceeding is not required, and the advice letter and/or protest may be resolved through a notice and comment process, workshop, or other informal hearing. This informal, non-evidentiary, procedure constitutes a Section 455 hearing. An advice letter subject to a Section 455 hearing must be suspended pending the disposition of the advice letter.

B. Disposition

1. Uncontested Acceptance

If an advice letter in its original form complies with the Commission order authorizing or requiring the filing of the advice letter, is not protested, raises no policy concerns or other substantive issues, does not require a formal proceeding, and does not request that the Commission issue an order approving the advice letter, staff may dispose of the advice letter by permitting it to become effective on its own terms. Staff must keep a log of advice letters that become effective by tacit acceptance, but need not take further formal action.

As is the case with any tariff that becomes effective without having been suspended, the Commission reserves the right under Section 455 to hold hearings regarding tariffs that become effective by tacit acceptance, and to thereafter alter or modify such tariffs where appropriate.

2. Staff Disposition Notice

If an advice letter is protested or modified, but, either in its original form or as modified, complies with the Commission order authorizing or requiring the filing of the advice letter, and raises no policy concerns or other substantive issues, does not require a formal proceeding, and does not request that the Commission issue an order approving the advice letter, staff will provide written notice stating the date upon which the advice letter will become effective. For example, staff, consistent with its role and responsibilities, can verify whether a particular calculation in an advice letter is correct. Similarly, staff may reject a protest that raises issues that go beyond the scope of the advice letter.

Staff may provide written disposition notices in circumstances set forth in Section V.B.1, although there is no obligation to do so.

3. Resolution Or Other Commission Order

If an advice letter may not be disposed of by uncontested acceptance or a staff disposition notice, staff must propose, and circulate for public review and comment, a draft resolution or other order for final action by the Commission. Draft resolutions will be noticed in the Commission's Daily Calendar, and an opportunity to file comments and reply comments will be provided. Where appropriate, staff may schedule workshops or other proceedings prior to preparing and circulating a draft resolution for the Commission's consideration.

VI. SUSPENSION OF ADVICE LETTERS

A. If A Section 455 Hearing Is Required

If a notice and comment process, workshop, or other informal hearing is required, staff must suspend the advice letter by the relevant initial default effective date unless the advice letter has by that date been disposed of by an uncontested acceptance log entry, a staff disposition notice, or a Commission resolution or other order.

B. If An Advice Letter Requests A Commission Order

If an advice letter requests that the Commission issue an order approving the advice letter, the advice letter is automatically suspended, pending a Section 455 hearing and the Commission's issuance of a resolution or other order disposing of the advice letter, subject to the following exception. If such an advice letter is, pursuant to these guidelines, subject to rejection rather than suspension, then the advice letter must be rejected rather than suspended. Utilities that wish to take advantage of the effective period within Section 455 should not include in an advice letter a request that we issue an order approving the advice letter.

C. If An Advice Letter Requires Staff Review

If a Commission order states that an advice letter will become effective upon staff's approval, staff must suspend the advice letter by the initial default effective date, pending a Section 455 hearing, unless: 1) staff has by that date notified the utility in writing that it has reviewed the advice letter and verified its compliance with the Commission order; or 2) the utility files an advice letter supplement requesting a later effective date in lieu of suspension of the advice letter, with the specified effective date being the date staff approves the advice letter.

VII. TIMING OF SUSPENSIONS

A. First Suspension Period

If an advice letter is suspended by staff, the first suspension period will run for no more than 120 days after the date on which the advice letter would otherwise become effective by operation of law, or until the Commission acts on the advice letter, whichever is earlier.

B. Second Suspension Period

If, by the end of the first suspension period, the Commission has yet to act on the advice letter, a second suspension period of 180 days will automatically begin. This second suspension period will run until the Commission acts on the advice letter, or until the second suspension period ends, whichever is earlier.

VIII. SUSPENSION NOTICES

A. Staff Notification

Any time staff suspends an advice letter, staff will notify the filer of the suspension and post notice of the suspension on the Commission's Daily Calendar. The notice may be issued by fax, mail, or e-mail.

B. Effective Date of Suspension

The first suspension period begins on the date the notice is issued to the filer of the advice letter, whether or not the notice has on that date been posted on the Commission's Daily Calendar.

C. Content of Suspension Notices

Suspension notices will include: 1) the date the suspension begins and ends; 2) the grounds for the suspension; and 3) in the case of first suspension, notice that the suspension will automatically be extended for an additional 180 days if the Commission has not disposed on the advice letter by the date the first suspension period ends.

D. Courtesy Notice of Second Suspension Period

Where a first suspension period is about to expire prior to Commission action regarding the advice letter, staff shall issue a notice of the additional 180 day suspension period that will automatically commence if the Commission has not acted on the advice letter prior to the end of this first suspension period. Notice of any suspension extension will be issued by fax, mail or e-mail and posted on the Commission's Daily Calendar. The notice of the automatic second suspension period is dictated by courtesy, and is not required before the second suspension period may become effective.

IX. XCOORDINATION WITH THE COMMISSION

A. Process

Division directors will: 1) process suspended advice letters as rapidly as practical; 2) notify the Commission of any suspension or extension thereof; 3) ensure, to the

maximum extent possible, that the necessary produced steps have been taken to permit the disposition of the advice letter prior to the end of the first suspension period; and 4) at least 60 days prior to the end of the second suspension period, report to the Commission, in writing, on the status of suspend3d advice letters.

B. Draft Resolutions

Staff must propose and circulate for public review and comment a draft resolution or other order addressing each suspended advice letter that has not been addressed by an uncontested acceptance log entry or a staff disposition notice in time for the Commission's consideration at a Commission meeting prior to the expiration of the first suspension period.